(5)

NO. 89-563

In the Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS & ASSOCIATES, INC.,
Petitioner,

VERSUS

COLONEL LLOYD KENT BROWN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AUDUBON PARK COMMISSION AND OF THE CITY OF NEW ORLEANS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a United States Army Corps of Engineers "nationwide permit" a "license" under the National Historic Preservation Act, 16 U.S.C. Section 470f (1982) requiring a full historic review where the activity qualifying for that nationwide permit is truly "inconsequential"?

LIST OF PARTIES

The Audubon Park Commission and the City of New Orleans adopt the listing of parties to the proceeding included in the Petition for a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit filed on behalf of the Vieux Carre Property Owners, Residents and Associates, Inc.

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This brief is submitted on behalf of the Audubon Park Commission and the City of New Orleans in opposition to the petition for a writ of certiorari filed on October 6, 1989. For the reasons set forth below, this application should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 875 F.2d 453 (5th Cir. 1989) and is reprinted in Petitioner's Appendix at page (1a).[1] The decision of the United States District Court for

[1] Citations to the Appendix ("App.") contained in this brief refer to the Appendix filed with Petitioner's writ application.

the Eastern District of Louisiana is unreported, but is also reprinted in Petitioner's Appendix at page (30a).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. The jurisdiction of this Court is invoked by the Petitioner under 28 U.S.C. Section 1254(1) (1982).

STATUTES AND FEDERAL REGULATIONS INVOLVED

National Historic Preservation Act, 16 U.S.C. Section 470f.

Rivers and Harbor Act of 1899, 33 U.S.C. Section 403.

33 C.F.R. Part 330 (1988) (U.S. Army Corps of Engineers' Nationwide Permit Regulations).

The statutory and federal regulatory provisions involved are reprinted in the Petitioner's Appendix at page (37a).

STATEMENT OF THE CASE

This suit was instituted in the United States District Court for the Eastern District of Louisiana by the Petitioner, a citizen preservation group, which objected to the construction of an Aquarium and an adjacent Park within the City of New Orleans. The Audubon Park Commission is an independent agency, created by law, which was authorized to plan, construct and operate these two facilities by the Louisiana Legislature.

Construction of the Aquarium itself began on October 29, 1987. It is currently seventy (70%) percent complete and is scheduled to open to the public on September 1, 1990. Construction of the Park was *completed*, and it *opened* to the public on October 20, 1989. The total cost of constructing the Aquarium is twenty-six (26) million dollars. The total cost of the Park was approximately five (5) million dollars.

On July 1, 1986, the Louisiana Legislature authorized the Audubon Park Commission to acquire riverfront property for use in the construction and operation of a riverfront aquarium and a riverfront park. A millage election was held within the City of New Orleans to approve a tax necessary to fund bonds needed for construction, and the necessary millage was approved by the voters of the City of New Orleans with a seventy (70%) percent affirmative vote on November 4, 1986.

The Aquarium and the Riverfront Park are two separate projects located within the boundaries of the Vieux Carre District ("French Quarter"). The sites of these projects are separated from the remainder of the French Quarter by a concrete flood wall, railroad tracks and over twenty (20) acres of parking lots and commercial buildings. The construction of the Aquarium building and the Park required removal of metal sheds that in recent years were used primarily for parking. The Aquarium construction is entirely *landward* of the "ordinary high water line" of the Mississippi River which is the line of demarcation used by the U. S. Army Corps of Engineers (the Corps) to determine the extent of its jurisdiction over navigable waters and its permitting jurisdiction. The Park was constructed by landscaping with trees, green space and benches a part of the Bienville Street Wharf that was also used primarily for parking cars. A twenty-five (25) foot wide strip of the

wharf, adjacent to the river, is reserved for continued maritime use.

The construction of the Park did not change the configuration of the wharf. The surface of the wharf was not enlarged or reduced. It is the same size and shape as before construction, only now it is landscaped. Neither the construction of the Aquarium nor the Park required the removal of or damage to a historic facility. The Bienville Street Wharf, which was constructed in 1930, remains intact.

The constructions of these facilities were studied and approved by the Vieux Carre Commission, the state constitutionally empowered body responsible for overseeing and protecting the historic nature and architecture of the French Quarter. These projects were also approved by the City of New Orleans Planning Commission and by the New Orleans City Council. Neither the construction of the Aquarium or of the Riverfront Park involve any *federal funds* or *federal property.*

The Corps was aware of the Aquarium and the Riverfront Park from their initial planning stages. When detailed schematic plans of the two projects were available, they were submitted by the Audubon Park Commission to the Corps for review to determine if any permits were needed under the Rivers and Harbor Act of 1899 ("RHA"). Under that Act, the Corps has jurisdiction to review and license any construction that affects "the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403 (1982). On May 14, 1987 the Corps determined that no permit was needed for construction of the *Aquarium* under the Rivers and Harbor Act, because it was being constructed

outside of the Corp's area of jurisdiction. The Corps also determined that no permit was required for the *Park* because it is "located on the presently permitted Bienville Street Wharf and, as such, will require no further action relative to a Department of the Army permit."

In essence, the Corps determined that because the Aquarium was to be constructed outside of the navigable waters of the Mississippi River and would have no effect on the river's navigability, it required no permit. Additionally, because the Park was to be created simply by landscaping the surface of the wharf, without changing the presently existing and permitted wharf structure, it also required no individual permit. Because there were no federal funds, permits or involvement in the Park, there was no need for review under the National Historic Preservation Act ("NHPA").

Petitioner, in addition to filing two state court suits to prevent construction, filed its complaint for mandamus, injunctive and declaratory relief in federal district court on August 6, 1987. The complaint argued, among other issues, that both the Aquarium and the Park required Rivers and Harbor Act permits from the Corps and, as a result, the historic review procedures provided by the NHPA were mandatory before the permits could be issued. On September 21, 1987, the trial court dismissed the complaint, and an appeal subsequently was noticed to the Fifth Circuit. On June 14, 1989, the Fifth Circuit affirmed in part and reversed in part the trial court's ruling and remanded that matter to the trial court for further consideration. The Fifth Circuit treated the Aquarium and Riverfront Park as two separate and distinct projects. 875 F.2d at 455; App. at 3a-4a. The Fifth Circuit held that the Aquarium was outside the Corps' jurisdiction under Section 10 of the Rivers and Harbor Act, 33 U.S.C. § 403, because the Project was

beyond the ordinary high water line of the Mississippi River. 875 F.2d at 461-462; App. at 21a. As a result, no historic review under the NHPA was required for the Aquarium. It also held that the Petitioner had no right of action against the private defendants to enjoin either project, and its only cause of action was against the Corps under the Administrative Procedure Act. 875 F.2d at 458; App. at 9a. The Petitioner has not asked this Court to review these rulings.

With regard to the Park construction only, the Court ruled that "nationwide permits authorizing truly inconsequential activities are not triggering 'licenses' under Section 470f" of the NHPA. 875 F.2d at 465; App. at 25a. It remanded the case to the district court to determine: (1) whether the Park falls within the Corps' nationwide permit regulation found at 33 C.F.R. §330.5(a)(3); (2) if it falls under that regulation, to determine whether the Park is so inconsequential that it escapes historic preservation review and (3) if it escapes historic review, the district court was requested to address issues raised in § 330.5(b)(9) of the Corps' regulations. 875 F.2d at 466; App. at 26a-27a. Trial on these issues is set before the district court on January 24, 1990.

On October 6, 1989, Petitioner filed this writ application on the limited issue of whether, for purposes of the Riverfront Park, a nationwide permit is a "license" subjecting the Park construction to the historical impact review procedures of the NHPA. Although Petitioner continually refers throughout its writ application to both the Aquarium and the Park as the "Aquarium Project", the Fifth Circuit recognized that they are two separate and distinct projects. Petitioner's writ application does not challenge the Fifth Circuit's ruling with regard to the Aquarium. Rather, its claim is limited to the Riverfront

Park and the Fifth Circuit's interpretation of 16 U.S.C. §470f as not requiring a historic review for truly inconsequential activities.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals that the nationwide permit under 33 C.F.R. §330.5, for inconsequential activities, is not a "license" under § 470f of the NHPA is correct. There is no conflict among the circuits on this issue as argued by the Petitioner. The Fifth Circuit followed and did not alter basic rules of statutory construction that have been in effect for at least one hundred years, when it refused to interpret Section 106 of the NHPA in a manner never intended by Congress. Those rules require courts to interpret statutes in a manner that does not lead to absurd and unintended results. Finally, the Park is now complete and open to the public. As a result, this writ application is moot, and there is no need for further review by this Court.

I. SECTION 470f OF THE NHPA DOES NOT REQUIRE A HISTORIC REVIEW OF INCONSEQUENTIAL ACTIVITIES AND THERE IS NO CONFLICT BETWEEN THE CIRCUITS FOR THIS COURT TO RESOLVE.

Section 470f of the National Historic Preservation Act requires the "head of a federal agency" to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register" before the "issuance of any license." 16 U.S.C. § 470f. The historic review procedures are triggered when a federal agency is *required* to issue a license for an undertaking. The Fifth Circuit held that the Corps' nationwide permit pursuant to 33 C.F.R. § 330.5(a)(3) was not a "license" under § 470f where the nationwide permit

authorizes a "truly inconsequential" activity. 875 F.2d at 465; App. at 25a. The Petitioner argues that the Fifth Circuit's decision is incorrect and conflicts with a 1985 holding of the Tenth Circuit and a 1987 decision of the Eighth Circuit that should be resolved by this Court. No such conflict exists, the position of the Petitioner is without support, and the decision of the Fifth Circuit should be upheld.

The Corps has the authority under the Rivers and Harbor Act to issue permits for activities and constructions that interfere with the navigable waters of the United States. The Corps has recognized through its regulations, however, that a certain class of activities either has no effect on navigability or has such an inconsequential effect that no formal individual permitting should be required. For those activities the Corps has created a "nationwide permit" described as follows:

> Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paper work. Nationwide permits are valid only if the conditions applicable to the nationwide permit are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit. 33 C.F.R § 330.1.

Some of the activities authorized by a nationwide permit that do not require individual permitting are the placement of navigational aids, fish and wildlife harvesting, (pond nets, crab traps, duck blinds, etc.), staff, tide and water gauges, seismic activities and single boat buoys. 33 C.F.R. Section 330.5. It is unimaginable that Congress intended that the Corps require an individual permit under the RHA, with a full historic review under the NHPA, for a

fisherman to place a crab trap into United States waters or for minor repairs to a wharf. The interpretation of these statutes sought by the Petitioner require that result.

The nationwide permit that the Fifth Circuit determined could apply to the Park authorizes without individual permit:

> (3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for such authorization, provided such repair, rehabilitation or replacement does not result in a deviation from the plans of the original structure of fill. . . 33 C.F.R. § 330.5

The Fifth Circuit did not determine whether the Park was encompassed by this regulation, but remanded that issue to the district court. It also did not determine that all activities allowed by the Corps' nationwide permit program escape historic review, but that only "inconsequential" activities are not encompassed. 875 F.2d at 466; App. at 27a. Further, the Court did not determine that the Park Project was "inconsequential", but remanded that issue to the district court as well. 875 F.2d at 466; App. at 27a.

The only issue presented under this petition is the Fifth Circuit's general determination that Congress never intended to subject truly "inconsequential" activities to the NHPA historic review procedure. 875 F.2d at 466; App. at 27a. The Court's determination of Congressional intent was correct. The NHPA was never intended to mandate a historic review for all activities, however minor. The legislative history of the Historic Preservation Act of 1980

shows that the degree of federal involvement in any project is the key in determining whether review is necessary. It states:

> The committee intends that the council take a "reasonable effort" approach in guiding federal agencies in carrying out their preservation responsibilities. This means that the degree of federal involvement in an undertaking and the relation of the involvement to the effects on an historic property should both be considered when an agency determines the actions it will take, or which it requires an applicant to take, to comply with the provisions of this act and its implementing regulations. 1980 U.S. Code Cong. & Admin. News 6378, 6408.

The review required should relate to the federal involvement in the project *and* the relationship of that federal involvement to any effect on historic properties. In this case, the federal involvement with the Park is nonexistent. By merely landscaping the existing wharf structure, the Audubon Park Commission has engaged in an activity that the Corps, through its regulations, has determined is not important enough to merit any significant Corps involvement. The Park construction has no effect on the navigability of the Mississippi River. The work performed is cosmetic only.

The Eighth Circuit has refused to require a historic review when the federal involvement in a project is minimal or inconsequential. *Ringsred v. Duluth, A Minnesota Home Rule Charter City,* 828 F.2d 1305 (8th Cir. 1987). In *Ringsred,* the court refused to require a historic review of a parking facility when the only federal involvement was a required review and approval of contracts relative to the ramp, prior to construction. *Id.* at 1308. The court held that such lack of significant federal involvement does not con-

stitute an "undertaking" under Section 106 of the NHPA requiring a historic review. *Id* at 1309. This is in accord with decisions under the National Environmental Policy Act that state that a private act does not become a major federal action, requiring an environmental review, because of some incidental federal involvement. *See, Save Our Wet Lands, Inc. v. Sands,* 711 F.2d 634 (5th Cir. 1983).

The *Ringsred* decision is not in conflict with the Fifth Circuit's decision in this case, as asserted in the Petitioner's writ application. Both decisions recognize that minor and incidental or "inconsequential" federal involvement in a project is not enough to require a historic review under the NHPA. Likewise, the Tenth Circuit decision cited by the Petitioner does not conflict with the decision in this case. In *Riverside Irrigation District v. Andrews,* 758 F.2d 508 (10th Cir. 1985), the court held that the Corps of Engineers was correct in denying a nationwide permit to a party seeking to deposit dredge material, where the proposed deposit did not meet the requirements of the Corp' nationwide permit regulations. Those regulations required that the proposed discharge not destroy a threatened or endangered species or destroy or modify the habitat of that species. *Id* at 511.

In *Riverside,* the Corps permitting jurisdiction arose under the Clean Water Act. 33 U.S.C. § 1344. There was no historic review at issue but rather an environmental review triggered by the Endangered Species Act ("ESA"). 16 U.S.C. § 1536. The *Riverside* court stated that the ESA required the Corps "to *insure* that actions *authorized, funded* or *carried out* by it do not jeopardize the continued existence of an endangered species." *Id* at 512. The court further stated that under the Clean Water Act (unlike the National Environmental Policy Act) no "major federal

action" was required before the Corps was required to consider environmental impacts of each act it authorizes, both major and minor. *Id* at 513.

The *Riverside* case does not conflict with the Fifth Circuit's decision below. First and foremost, *Riverside* deals with the Clean Water Act and the ESA, as opposed to the Rivers and Harbor Act and the NHPA. The ESA language is very different from that of the NHPA. The ESA requires an agency "to insure" that any of its actions do not jeopardize endangered species. The NHPA only requires the agency to "take into account the effect of the undertaking" on historic sites. There is no conflict between the *Riverside* decision and the decision herein, and there is no division in the circuits for this Court to resolve.

Finally, the Fifth Circuit relied on generally accepted and long held rules of statutory interpretaion in reaching its decision. The Petitioner alleges in its application that the Fifth Circuit "substantially broadened the range of circumstances in which a federal court may reject the plain meaning of unambiguous statutory language," by refusing to follow a literal reading of the NHPA when a result unintended by Congress would result. In fact, the Petitioner admits that the courts are free to deviate from the literal language of any statute when the failure to do so would lead to absurd consequences or would contravene legislative intent. This Court has reached that conclusion as well. *Rector of the Holy Trinity Church v. United States,* 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); *Perry v. Commercial Loan Company,* 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed. 2d 827 (1966). In *Perry,* this court stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this court has followed that purpose rather than the literal words". *Id.* at 400 (citation omitted).

The Fifth Circuit merely applied this longstanding rule to the NHPA and found that a literal construction would lead to unreasonable and unintended results when applied to "inconsequential" activities. The court made no ruling as to whether the Park was inconsequential; that issue is on remand to the district court.

The Petitioner's interpretation of the NHPA as requiring a review in this instance leads to absurd or unintended results. It would require a historical review when a fisherman sets a crab trap in a river or drops a single mooring buoy. It would also require a historic review for painting or repairing an existing wharf. It would require a review, as in this case, for planting grass or placing potted plants and benches on a wharf. Such a result is absurd, unintended by Congress and should not be adopted by this Court. The Fifth Circuit has not broadened the rules of statutory construction in any way, and no reason to review its ruling exists.

II. THE RIVERFRONT PARK PROJECT WAS COMPLETED AND OPENED ON OCTOBER 20, 1989, THEREBY RENDERING THE ISSUES IN PETITIONER'S WRIT APPLICATION MOOT.

It is well settled that "federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 104 S.Ct. 373, 374, 78 L.Ed.2d 58 (1983). Article III prohibits federal courts from issuing advisory opinions. As this Court has stated on numerous occasions, we are "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before [us]." *California v. San Pablo & Tulare Railroad*, 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747 (1893).

In general, a case becomes moot when the activities for which an injunction is sought have already occurred and cannot be undone. *Florida Wildlife Federation v. Goldschmidt*, 611 F.2d 547 (5th Cir. 1980); *Richland Park Homeowner's Association v. Pierce*, 671 F.2d 935 (5th Cir. 1982); *Friends of the Earth v. Bergland*, 576 F.2d 1377 (9th Cir. 1978); and *Monzillo v. Biller*, 735 F.2d 1456 (D.C. Cir. 1984). For example, in *Goldschmidt*, the plaintiffs sought to enjoin the funding and construction of a portion of an interstate highway on the basis of noncompliance with the environmental impact statement requirement of the National Environmental Policy Act. The Fifth Circuit held that the issue had become moot while on appeal because the only portion of the highway sought to be enjoined and for which no impact statement was prepared *was substantially completed*. The court noted that a substantial

amount of property had already been acquired around the route selected for the construction and that for those limited portions of the highway which were not completed, impact statements or their functional equivalent had been prepared. Further, the highway was nearly finished, and the vast majority of families had been relocated and businesses reestablished. The court went on to hold that the action was moot on the grounds that the activity sought to be enjoined had already substantially occurred and the judiciary could not undo what had already been done. The court remanded the case to the district court to be dismissed as moot.

In this case, the Park was completed and opened to the public on October 20, 1989. Petitioner's writ application is now moot, and any injunctive relief would be futile. *City of Romulus v. County of Wayne,* 634 F.2d 347 (6th Cir. 1980). Therefore, this Court should find that the issue involved in this case is now moot and there is no occasion for further review by this Court.

CONCLUSION

For the reasons set forth above, the Audubon Park Commission and the City of New Orleans submit that Petitioner's Application for Writ of Certiorari should be denied.

NEW ORLEANS, LOUISIANA, this 2nd day of November, 1989.

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